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# OFFICE OF CONGRESSIONAL AFFAIRS

## Routing Slip

	ACTION	INFO
1. D/OCA		X
2. DD/Legislation	X	X
3. DD/Senate Affairs		X
4. Ch/Senate Affairs		
5. DD/House Affairs		X
6. Ch/House Affairs		
7. Admin Officer		
8. Executive Officer		X
9. FOIA Officer		
10. Constituent Inquiries Officer		
11.		
12.		

SUSPENSE

19Dec86

Date

Action Officer:

Remarks:

12Dec86

ecf

Name/Date

Do we need to respond to this? It looks like a form letter

NINETY-NINTH CONGRESS

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## U.S. House of Representatives

COMMITTEE ON POST OFFICE AND CIVIL SERVICE

SUBCOMMITTEE ON CIVIL SERVICE

122 CANNON HOUSE OFFICE BUILDING

Washington, DC 20515

December 8, 1986

TELEPHONE (202) 225-4025

Honorable William J. Casey  
Director of Central Intelligence  
Central Intelligence Agency  
Washington, DC 20505

Dear Mr. Director:

The Office of Personnel Management (OPM) promulgated guidelines entitled "Establishing a Drug-Free Federal Workplace," on December 1, 1986. I urge you to ignore these guidelines. They are contrary to the provisions of the Executive order on drug testing. There is no authority in law or regulation for the random program described in the guidelines. No funds have been authorized or appropriated for this purpose. On several key issues -- randomness, consent, and penalties -- the guidelines are an open invitation to litigation. Your agency could better perform its mission and save the taxpayers money by ignoring the OPM issuance.

1. Random Testing. Executive Order 12564 [51 Fed.Reg. 32,889 (1986)], does not authorize random testing. The order requires agency heads to establish drug testing programs, but the nature and extent of such testing is left to the discretion of the agency head. Indeed, the word "random" does not appear in the order.

Yet, random testing is at the crux of the OPM guidelines. Sections 3(a)(4) and 3(a)(5) of the guidelines spell out how to conduct tests in a random manner to avoid charges of arbitrary and capricious agency action. The guidelines emphasize that the alternative to random testing is comprehensive testing of everyone eligible, a far more expensive proposition for the agency.

OPM simply ignores the constitutional issues raised by a random testing program. Agency heads contemplating such a program cannot afford to do so. Almost every court which has considered a random testing program has struck it down as violating the Fourth Amendment's prohibition against unreasonable search and seizure. Most recently, the U.S. District Court for the Eastern District of Louisiana decided that the random testing program of the U.S. Customs Service was unconstitutional, and issued a permanent injunction prohibiting the Customs Service from conducting random tests of its employees. (National Treasury Employees Union v. von Raab, USDC E.La, Nos. 86-3522 and 86-4088, November 12, 1986). A

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suit by three federal employee organizations challenging the constitutionality of the Executive order is pending before the same court.

2. Consent. The guidelines raise the issue of consent in two areas. The first is consent to the test itself as a condition of employment; second, consent to the release of the results of a urinalysis test to agency management.

Under the guidelines, if an employee or applicant does not give consent, he or she cannot hold the job. Section 4(d) states that an agency must take disciplinary action, including removal, against an employee who refuses to take a urinalysis test. A refusal to consent to release of drug test results to management is to be considered a refusal to take the test for disciplinary purposes.

The Executive order does not discuss consent, nor penalties for refusal to take a drug test. The order does require that drug testing programs "protect the confidentiality of test results" (Sec. 4(c)). Yet the OPM guidelines, under which an employee's test results will be disclosed to a minimum of three agency management officials, destroy confidentiality.

Further, agencies cannot simply require drug testing as a condition of employment. An individual cannot be forced to give up constitutional rights for the opportunity to work for the Federal government. And, an employee's consent to drug testing (waiving a Fourth Amendment right) or consent to release of test results (waiving confidentiality of patient records under 42 U.S.C. 290ee-3) would surely be held involuntary when withholding consent could lead to loss of a job. If an agency lacks an employee's voluntary consent, requiring the employee to submit to drug testing would make the results of such test unuseable and could well make both the agency and agency officials liable for violating the employee's rights.

3. Penalties. The Executive order stresses employee assistance, counseling, and rehabilitation. Even if an employee is temporarily removed from his or her job pending successful completion of a drug rehabilitation program, under the Executive order, that employee would be allowed to return to the job.

Under the guidelines, an employee could be fired and must be punished after one positive test or refusal to take the test and must be fired after two. Mandatory penalties of this sort are rare in Federal personnel law because mandatory penalties are frequently counterproductive and bad management.

Mandatory removal is particularly inappropriate when it is based on a technological process with a documented error rate of at

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least 5% and severe quality control problems. A 1985 report on drug testing laboratories by the Centers for Disease Control found false positive error rates of up to 66 percent.

The guidelines mandate penalties after one positive test. Yet, they fail to mention the requirements of the nexus test and the Rehabilitation Act. The guidelines conveniently ignore the substantial job-relationship and reasonable accomodation hurdles which an agency must clear before it can impose any penalty. Taking an action against an employee who tests positive is a major legal undertaking for an agency. Whether this is the best use of your agency's limited resources is a decision for you to make, not OPM.

4. Cost. The White House has said that the drug testing program would cost \$56 million to implement. Office of Management and Budget officials subsequently admitted that this figure was pulled out of the air. I estimate the cost at closer to \$300 million. Congress has not authorized any funds for drug testing programs. Therefore, agencies must divert funds from authorized programs into any drug program.

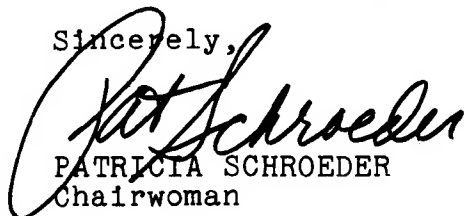
Regardless of whether a government-wide drug testing program costs \$56 million or \$300 million, implementation of the guidelines will reduce the resources otherwise available for achieving the mission of your agency.

5. Human Dignity. Individuals are hired to perform work for the people of the United States. They are not hired to be escorted into a rest room, guarded while they urinate, and have the urine they produce checked for "color, temperature, or other evidence that tampering may have occurred." Management officials were not hired to act as rest room guards.

I find this entire process demeaning to human dignity and improper for the government. The drug testing fad is a politically motivated response to a serious social problem. As the head of a Federal agency, you can prevent this degradation from taking place. I urge you to do so.

With kind regards,

Sincerely,



PATRICIA SCHROEDER  
Chairwoman

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U.S. HOUSE OF REPRESENTATIVES  
SUBCOMMITTEE ON CIVIL SERVICE  
COMMITTEE ON POST OFFICE AND CIVIL SERVICE  
WASHINGTON, DC 20515

OFFICIAL BUSINESS

Patricia Schroeder  
M.C.

M.C.

Honorable William J. Casey  
Director of Central Intelligence  
Central Intelligence Agency  
Washington, DC 20505



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